STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Floyd and Emily Hunter
Hunter Service Station
4129 Briar Place
Delevan, Wisconsin 53115

Hearing # 01-92
PECFA Claim # 53115-1856-35

Proposed Findings of Fact, Conclusions of Law, and Decision

The Department of Commerce (Department) February 2, 2001 decision denied reimbursement of certain remediation costs at the Hunter Service Station, Delevan, Wisconsin. Petitioners, Floyd and Emily Hunter, Hunter Service Station, by their March 2, 2001 petition to the Department for hearing on the decision, filed a timely appeal from the Department's Petroleum Environmental Cleanup Fund Act (PECFA) decision.

A prehearing conference on the appeal was held on June 29, 2005. Pursuant to proper notice, a class 3 administrative hearing was held on November 8, 2005 in Madison, Wisconsin, Steven Wickland, administrative law judge (ALJ) presiding. Following the hearing, the parties filed written briefs, with the last brief received January 9, 2006.

The issue for determination raised by the 2001 petition was: Whether the Department's decision dated February 2, 2001 was correct with regard to the disputed costs identified in Petitioners' appeal received by the Department on March 2, 2001.

At the June 29, 2005 telephonic prehearing conference the June 1, 2001 interim settlement agreement between the parties was discussed. Because of that agreement, the issue for hearing was narrowed to the correctness of the Department's denial of that portion of the PECFA claim

amounting to $17,201.00 (plus applicable interest). The denial was based on the Department's determination that the consultant AES had a conflict of interest which rendered that amount ineligible for reimbursement.

In accordance with Wis. Stat. § 227.47 and 227.53(1)(c) the parties to this proceeding are certified as follows:

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The authority to issue a final decision in this matter remains with Department of Commerce Secretary Mary P. Burke by effect of the order of then Department Secretary Brenda J. Blanchard dated March 6, 2001.

Petitioners Mrs. Emily Hunter appeared at the hearing and testified. State of Wisconsin Department of Commerce staff Dennis Legler and Carl Kramer testified for the respondent.

FINDINGS OF FACT

1. This is an appeal filed by Floyd Hunter and Emily Hunter of a Department decision dated February 2, 2001. The decision determined that a substantial part of the costs of the remediation of their petroleum storage tank system was ineligible for PECFA reimbursement after the audit of the claim. The system was located at 235 South 7th Street, Delavan, Wisconsin.

2. The Department's decision paid PECFA reimbursement of costs of $57,638.86 on Petitioners second claim (Respondent exhibit R-1).

3. The appeal was received on March 2, 2001, and challenged the Department's decision as to PECFA reimbursement. The petition sought a hearing by the Department, with petitioners seeking to obtain further reimbursement of $219,632.82 plus interest.

4. The petition noted, in pertinent part, that the Department paid an initial invoice of Charles Miller in the amount of $12,390 in March, 2000 during the PECFA process, but by its February 2, 2001 decision the Department deducted that same amount.

5. Subsequent to the petition being filed, the Department made a further determination that an additional $153,787.28 in costs plus PECFA eligible interest ($44,531.98) was payable. The Department reimbursed the Petitioners that amount pursuant to an interim settlement agreement dated June 6, 2001 (Respondent exhibit R-3).

6. The petitioners reserved the right, pursuant to the June, 2001 interim settlement agreement, to appeal to hearing the remaining disputed amount of $17,201.00. At the June 29, 2005 prehearing, counsel for petitioners noted that the contested amount (now the sole contested amount) was, or had been $12,390 but after additional review or adjustment prior to the June 6, 2001 interim settlement agreement that amount was recalculated at $17,201.00.

7. AES (also known as AES Consultants) was the engineering consulting firm retained by petitioners to do the remediation work at the Delevan site. Strata Engineering, as subcontractor to AES, provided commodity services for the site. Charles Miller worked for or in association with AES and Strata Engineering on this remediation project.

8. The $17,201.00 represented the total of Strata Geological Services, Inc. ("Strata" or "SGSI") invoice numbers 2333, dated March 31, 1995, in the amount of $11,046.00 and 2361, dated May 25, 1995, in the amount of $6,155.00, respectively (the two invoices together referred to as "the Strata invoices") from Charles Miller for remediation work at the site.

9. Charles Miller on behalf of AES obtained bids for drilling services at the site. Rather than obtain independent bids for that work, Miller controlled the bidding process so that a company he was affiliated with, Strata Geological Services, was retained to do the drilling at the site.

10. The $17,201.00 was not paid by the Department to petitioners, nor did the Department seek recovery from others of that amount.

11. The Department determined that not all of the costs for services rendered by Charles Miller, as a representative of AES, were ineligible. While the Department paid some invoices pursuant to the interim settlement agreement, it did not pay the Strata invoices, where the Department determined that Charles Miller had used his own company, namely, Strata, to provide commodity services at the Hunter remediation site, on the grounds that this created a conflict of interest, making those costs ineligible for reimbursement.

12. The Department did not proceed pursuant to Wis. Admin. Code Comm §47.14 in recovery of $12,390.00 paid on March 24, 2000 to Charles Miller for services provided by him.

13. The Department deducted the amounts previously paid for the Charles Miller work by its audit and in its February 2, 2001 decision, such that the petitioners did not receive the adjusted amount of $17,201. (Exhibit R-3.)

14. At the time of the remediation of the petitioners' site, the Department did not have sufficient information or evidence to disqualify or de-certify AES or Strata Geological Services from its register.

15. The petitioners did not conduct any significant background check of their own concerning AES prior to their selection as AES as the consultant for the remediation of their site.

16. By it notice of hearing herein, dated July 6, 2005 the Department noticed this matter to be held as a Class 3 administrative hearing.

17. Petitioners' counsel served requests to admit and interrogatories upon respondent on or about September 2, 2005. By its terms, the responses to the request were due on or about October 2, 2005. No request for extension for additional time to respond was requested. The Department responded to the discovery requests on or about November 2, 2005.

APPLICABLE STATUTES AND CODES

§ 101.143(4)2(a) &(b), Wis. Stats**.** Awards for petroleum product investigations, remedial action planning and remedial action activities.

> **(2)** The Department may not issue an award before all eligible costs have been incurred and written approval is received under sub. (3)(c) 4, except as follows:
>
> (a) The Department may issue an award before all eligible costs have been incurred and written approval is received under sub. (3)(c) 4, if the Department determines that the delay in issuing the award would cause a financial hardship to the owner or operator or the person.
>
> (b) The Department shall issue an award if the owner or operator has incurred $50,000.00 in unreimbursed eligible costs and has not submitted a claim during the proceeding 12 months.

Comm. § 47.33 (1)3(b), Wis. Admin. Code. Comparative proposals and bid processes for remediation activities and services.

> **(3)** The service of the selected consulting firm shall be limited to providing the consulting services or scientific evaluation necessary to conduct an environmental response. Neither the consulting firm nor any company or consultant not independent of the consulting firm or project consultants may provide any of the commodity services required in the remediation.
> …
> **(b)** All commodity services which include, but are not limited to, soil borings, monitoring-well construction, laboratory analysis, excavation and trucking shall be obtained through a competitive bid process. A minimum of 3 bids are required to be obtained and the lowest cost service provider shall be selected. An employee of a commodity service provider may not participate in the preparation of bid documents or other requirements of the bid process, except for providing technical material, if the employee's firm is a bidder.

Comm § 47.14, Wis. Admin. Code. Right to recover actions.

> The Department reserves the right to take action against an owner, operator or person owning a home oil tank system, or their agents or designee, to recover any award or portion of an award resulting from a fraudulent claim.
>
> **(1)** RIGHT OF ACTION. A right of action under this section shall accrue to the state against an owner, operator, or other person if the owner, operator or other person submits a fraudulent claim or does not meet the requirements under this chapter or if an award is issued under this section to the owner, operator or other person for ineligible costs under this section.
>
> **(2)** ACTION TO RECOVER AWARDS. The Department shall request the attorney general to take action as is appropriate to recover awards to which state is entitled or when the Department discovers a fraudulent claim after an award is issued.

Comm § 47.41, Wis. Admin. Code**..** Method of disqualification

> **(1)** GENERAL. The Department may disqualify a consultant or consulting firm from admission to participate or make claims under the PEFCA program if the Department has investigated and determined that the consultant or consulting firm has failed to comply with this chapter. Defrauding the PECFA program shall be considered a criminal offense, as specified in s. 101.143(3)(g), Wis. Stats.

DISCUSSION

On March 2, 2001, the Hunters timely petitioned the Department and requested an administrative hearing for review of the February 2, 2001 Department decision in PECFA claim number 53115-1856-35, pursuant to Comm. § 47.53, Wis. Admin. Code. The appeal was filed on behalf of the petitioners Floyd and Emily Hunter. The Department received the appeal on March 2, 2001. The appeal challenged the Department's decision and requested a hearing on Petitioners' contention that $219,632.82 should be awarded them.

The basis for the Department's decision was the fact that Charles Miller, owner of Strata Geologic Services, and provider of commodities services in the remediation of Petitioners' site, worked for petitioners' consultant, AES, on site as project manager and was involved in the bidding process for site remediation work. The Department determined that this conduct violated Wis. Admin. Code Comm. § 47.33(1)3(b).

After the petitioners' original appeal was filed, it was further evaluated and a Department determination was made to settle part of the claim by the payment of $153,787.28 plus $44,531.98 in PECFA eligible interest. In the June, 2001 interim settlement agreement, the appellant reserved the right to proceed to hearing on appeal on the remaining sum of $17,201.00. (Exhibit R-3.) The $17,201.00 represented the total of Strata Geological invoices. The reimbursement denial in the amount of $17,201 was set as the single issue for hearing by the 2001 interim settlement agreement, as well as at the 2005 prehearing conference, and confirmed at the start of the hearing of this matter. The interim settlement agreement states: "Appellant specifically reserves the right to proceed to hearing on the appeal on the sum of $17,201.00 disallowed by the department pertaining to AES's conflict of interest, plus applicable interest. The appeal will proceed solely on that issue." (Exhibit R-3.)

Exhibit R-1 includes a ten-page itemization of specific amounts reviewed during the claim process. The itemization at page 10 denies the consultant costs of $12,390, and states in Notes To Claimant that "A cost recovery is being done on work performed by Charles Miller while he worked for AES and Strata Environmental. A total of $12,390.00 is being recovered from the prior claim paid on 03-24-00. A conflict of interest has been created and is thus considered ineligible for the program." Ex. R-1 at 11.

Ruling on petitioners' request that its request for admissions be deemed admitted.

As noted above, petitioners' counsel served requests to admit and interrogatories (in anticipation of later administrative hearing herein) upon respondent on or about September 2, 2005. By its terms, the responses to the request were due on or about October 2, 2005. No request for extension for additional time to respond was requested. The Department responded to the discovery requests on or about November 2, 2005.

Because this matter was noticed as a class 3 administrative hearing, there is no provision for discovery. Hence, although the respondent filed answers to requests for admission, filing such answers beyond the time allotted by petitioners does not give rise to a sanction for such untimeliness.

Petitioners stated at hearing and contended by post-hearing brief that the Department failed to file a timely response to its Requests to Admit, concluding that, by operation of law, such failure constitutes an admission to the request. The September 2, 2005 requests were by their terms due to be answered within 30 days. The Department filed the answers on or about November 2, 2005, a few days prior to hearing and beyond the allotted time. At the start of the hearing, petitioners asked that the case be decided as if the matters that were the subject of the

request be deemed admitted (pursuant to Wis. Stat. § 804.11) and therefore the case decided in favor of petitioners. A decision on that matter was deferred and the hearing proceeded.

Because Wis. Stat. § 227.45(7) limits discovery to class 2 cases (not class 3 cases, as noticed herein), discovery – as here, in the form of written requests for admissions – is not provided for in this matter. As there is no right to discovery, there is no right to sanctions for untimely compliance with petitioners' discovery requests. Thus, there is no penalty for lateness of filing of answers not required to be provided by respondent.

As noted above, the provisions for failure of the Department to respond in 30 days as prescribed in § 804.11(b) do not apply. Therefore, this opinion need not reach the contention that the respondent's failure to answer in a timely manner in any way prejudiced petitioners' ability to fully prepare its case. Thus, the case herein turns on its merits rather than the procedural point not applicable here.

The Department properly denied reimbursement of certain costs for commodity services provided by consulting firms. Wis. Admin. Code Comm. § 47.33(1)3(b) provides that a consulting firm is limited "to providing the consulting services….Neither the consulting firm nor any company or consultant not independent of the consulting firm or project consultants may provide any of the commodity services required in the remediation."

The Department presented the testimony of Dennis Legler, who has been part of the Department's PECFA program since 1992, starting as a claim reviewer. Mr. Legler is currently chief, PECFA claims review section, a position he has held since 2000. As such he supervises all phases of the section's activities and oversees the PECFA claims review staff, who evaluate claims for reimbursement consideration. Legler testified at hearing that, among other things, Charles Miller controlled the bidding process, even though because of his association with AES

and Strata, he was not independent of the consulting firms involved in this remediation project. Legler noted that Miller helped his company, Strata, obtain the right to do the drilling at the site. Strata was a subcontractor for AES. Yet, Legler stated that Miller was being paid by AES to obtain commodity service providers. Legler gave his opinion that the Miller / Strata conduct, in connection with AES, demonstrates a lack of independence of the consultant(s) from the process of securing commodity services (such as drilling). Thus, with AES as the consultant, its subcontractor, Strata, should not have been a service provider.

Department staff member Carl Kramer testified concerning the claim herein. Mr. Kramer was a Department of Industry, Labor and Human Relations field auditor from 1982 through 1994, during which time he also started doing work for the Department of Commerce during the latter part of that period. During 1994 he became a senior field auditor. Now a Department PECFA program field auditor, Kramer reviews cost information filed in support of PECFA claims and he worked on the Hunter claim. In early 2001, Kramer performed a PECFA audit of the Hunter claim. He determined that Charles Miller's close connection to Strata and with AES resulted in a lack of (the required) independence for Strata to engage in PECFA eligible commodity work for AES clients (including, in this case, petitioners). He said that Miller was both a field tech for AES; in addition, Miller had created Strata, and would broker out drilling efforts for AES projects, including this project. Kramer stated that in his opinion this conduct violated Comm § 47.33(1)3(b), making the $17,201 in Strata costs ineligible for PECFA reimbursement.

This consultant conduct clearly violates § 47.33(1)3(b). Therefore, the Department properly denied, by its February 2001 decision, reimbursement to petitioners of the $12,390. (R. Ex. 1 at page 10.) By the time of the June, 2001 interim settlement agreement, the adjusted

amount for these ineligible Strata invoices was apparently $17,201 and that issue and amount were accordingly preserved for hearing. (R. Ex. 3)

The Department has discretion in making the determination as to whether to disqualify AES or Strata from PECFA participation.

Petitioners contend that the Department improperly failed to disqualify AES, Miller or Strata from the PECFA process pursuant to Comm § 47.41, Wis. Admin. Code.

Comm § 47.41, Wis. Admin. Code, provides, in pertinent part:

> Comm 47.41 Method of disqualification. (1) GENERAL. The Department may disqualify a consultant or consulting firm from admission to participate or make claims under the PEFCA program if the Department has investigated and determined that the consultant or consulting firm has failed to comply with this chapter. Defrauding the PECFA program shall be considered a criminal offense, as specified in §101.143(3)(g), Wis. Stats. (Emphasis added).

Petitioners interpret Comm § 47.41, Wis. Admin. Code as mandating that the Department shall or must disqualify a consultant or consulting firm from ability to participate or make claims under the PEFCA program in these circumstances. However, the use of the term "may" in the rule retains Department discretion to disqualify or not disqualify a given non-complying consultant or consulting firm in a given situation. The code does not mandate the Department disqualify the offending consultant or consulting firm, but rather gives it the authority to do so. Thus, Department has discretionary authority to disqualify AES, Miller or Strata pursuant to Comm §47.41. The question, then, is whether the Department properly exercised such discretion in this case, discussed below.

The Department acted reasonably in determining that it lacked sufficient evidence to require disqualification of AES, Miller or Strata.

Comm § 47.41, Wis. Admin. Code, provides that "…the Department may disqualify a consultant or consulting firm…if the Department has investigated and determined that the consultant or consulting firm has failed to comply with this chapter." (Emphasis added).

PECFA section chief Dennis Legler testified that at the time petitioners' site was being remediated, the Department, although suspicious of consultants working for petitioners on the site, did not have sufficient evidence to determine that the consultant or consultants had failed to comply with Comm Chapter 47, as required under Comm § 47.41, Wis. Admin. Code. He noted that an attempt to disqualify a consultant or consulting firm without sufficient evidence to justify such an attempt would not only deny them due process, but also expose the Department to liability for damages for libel or slander. Legler also stated that because the amount at issue in the Strata invoices represented a small portion of the claim and a small amount itself, it would be impracticable to pursue it or refer it for action.

The Legler testimony shows that Department, by its PECFA staff, had concerns about the consultants working on the site, but believed there was insufficient evidence to decertify or disqualify those consultants. This testimony was credible and reasonable, reflecting an effort to proceed carefully and fairly. Based on this testimony, the Department did exrcise reasonable regulatory discretion in deciding not to disqualify the consultants.

The Department acted reasonably in not recovering the $17,201.00 from the consultants pursuant to Comm §47.14, Wis. Admin. Code, because the Department did not establish that Miller's actions were fraudulent.

Petitioners argue that the Department failed to follow the recovery procedure provided by Comm § 47.14, Wis. Admin. Code. Mr. Legler testified that the procedures were not utilized as the amount was relatively small. Legler referred to situations where the remediation is complete and the amount to be referred to the Attorney General's office is not large enough to refer because the Department of Justice is reluctant to take on action where the amount of controversy is so small. Another reason the $17,021.00 amount was not referred to the attorney general's office for recovery was that while a violation of Comm §47.33(1)3(b), Wis. Admin. Code caused the amount to be ineligible for reimbursement, Miller's actions were not deemed by the Department to be fraudulent under Comm §47.14. Mr. Kramer testified that Miller was operating as both a field tech for AES and also created Strata and through Strata obtaining drilling services for the site, thus obtaining commodity services in violation Comm §47.33(1)3(b). The Department staff focused on the lack of required independence by Miller and Strata such that those actions violated Department rule and made certain costs ineligible.

The Department acted within its authority when processing the claim to deduct the contested amount from payments yet to be made.

Mr. Legler also testified that the when the PECFA program was set up, the only time a claimant could get paid would be when the all the remediation was complete and all invoices submitted to the Department for reimbursement. At that point all of the invoices were submitted and any basis for denials would be in the file. He said that process created a hardship for property owners to get large bank loans. This because their repayments to the lender would be

delayed for several months pending completion of the remediation process. Lenders were reluctant to make $300,000 to $600,000 loans, with no payments made until the final payment upon PECFA completion. Reimbursement milestones, i.e., progress payments along the way, were needed, Legler said.

The law was changed to allow the Department to make certain progressive payments known as milestone payments after certain benchmarks are met. § 101.143(4)2(a) & (b), Wis. Stats., provides:

§ 101.143(4)2(a) &(b), Wis. Stats. Awards for petroleum product investigations, remedial action planning and remedial action activities**,** provides in pertinent part that:

> 2. The Department may not issue an award before all eligible costs have been incurred and written approval is received under sub. (3)(c) 4, except as follows:
>
> (c) The Department may issue an award before all eligible costs have been incurred and written approval is received under sub. (3)(c) 4, if the Department determines that the delay in issuing the award would cause a financial hardship to the owner or operator or the person.
>
> (d) The Department shall issue an award if the owner or operator has incurred $50,000.00 in unreimbursed eligible costs and has not submitted a claim during the proceeding 12 months.

Implicit in the Department's authority to make progress payments is also the authority to rectify the issuance of awards issued to which the owner, operator or other persons are not entitled to because of ineligibility. As a result, Mr. Legler explained that the Department developed an internal procedure, pursuant to the authority granted under Wis. Stat. § 101.02(6)(a), Wis. Stats. This section, dealing with powers, duties and jurisdiction of Department, provides:

> (6) (a) All orders of the Department in conformity with law shall be in force, and shall have be prima facie lawful; and all such orders shall be valid and in force, and prima facie reasonable and lawful until they are found otherwise upon judicial review thereof pursuant to ch. 227 or until altered or revoked by the Department.

> Under § 101.01(9), Wis. Stats., the term "Order" mean any decision, rule, regulation, direction, requirement or standard of the Department, or any other determination arrived or decision of the Department.

The policy as described by Mr. Legler has the Department reimburse owner, operators or other persons when a milestone of $50,000.00 in incurred costs is met. In the case at hand, the Department paid the $17,201.00 in an initial claim (claim number 1), without realizing that the costs were ineligible. Subsequently, after discovering that the award was paid for ineligible costs, the Department decided to "offset" the amount by deducting it from future reimbursements in claim number 2, pursuant to the authority granted under Wis. Stat. § 101.143(4)2(a) &(b). This is reasonable, as an authorized, practical way to allow the Department to exercise its authority in administering the PECFA program. There was no "recovery" of those amounts under Comm §47.14, Wis. Admin. Code, because the remediation of the Hunter site was incomplete and additional funds would be payable for the site.

The doctrine of equitable estoppel does not pertain to these facts.

The petitioners raise the doctrine of equitable estoppel. To establish equitable estoppel, petitioners must demonstrate that the Department's action or non-action induced reasonable reliance to their detriment. Kamps v. DOR, 2003 WI app 106, 264 Wis. 2d 794, 663 N.W. 306. "When etsoppel is asserted against the government, the party invoking it bears a heavy burden; the evidence must be so clear and distinct that the contrary result would amount to a fraud." ***Id.*** Additionally, the Wisconsin Supreme Court has held that "The doctrine of equitable estoppel 'is not applied as freely against governmental agencies as it is in the case of a private person.'" Libby, McNeill & Libby v. Department of Taxation, 260 Wis. 551, 559, 51 N.W. 2d 796 (1952). Courts have recognized "the force of the proposition that estoppel should be applied against the Government with utmost caution and restraint, for it is not a happy occasion when the

Government's hands, performing duties in behalf of the public, are tied by the acts and conduct of particular officials in their relations with particular individuals." Schuster v. Commissioner of Internal Revenue, 312 F. 2d 311, 317 (9th Ci. 1962).

Petitioners argue that the Department did not warn them that there were some apparent irregularities about the manner in which AES conducted business and therefore the Department should not have denied the cost included in Strata's invoices. Petitioners suggest that they relied on the fact that AES was a registered consultant with the Department and that said reliance resulted to their detriment.

Dennis Legler said that the Department had paid petitioners to date reimbursement amounts of $680,770.37. Mr. Legler testified that when the PECFA program process was set up, there was a requirement that all consultants or consulting firms register with the program. However, there was no process for certification or testing as there now is with the tank testers or inspectors. Thus, he testified that the registration listing was essentially no more than a "yellow pages" for consultants or consulting firms, and the Department had no way of verifying the honesty or even the qualifications of a potential consultant or consulting firm to do the work for which they were registering.

Mr. Legler further testified that the Department could not and did not disqualify AES or Strata because there was no hard evidence that a violation had occurred to warrant such action. He noted that the Department did not shut down businesses without hard evidence that a violation had occurred.

"Equitable estoppel may be applied when the action or inaction of a party induces reliance by another to that person's detriment." *Nugent v. Slagh*, 249 Wis. 2d 220, ¶ 19, p. 230, 638 N.W. 2d 594, 598 (2001).

> Equitable estoppel has four elements: "(1) action or non-action, (2) on the part of one against whom the estoppel is asserted, (3) which reasonable reliance thereon by the other, either in action or non –action, and (4) which is to his or her detriment."

Id. at ¶ 29, p. 237 quoting *Milas v. Labor Assn. of Wisconsin, Inc.*, 214 Wis. 2d. 1, 11-12, 57 N.W. 2d 656 (1977). "Once the elements of estoppel have been have been established as a matter of law, the decision to actually apply the doctrine to provide relief is a matter of discretion." *Id. at* ¶ 30, p. 238 (citation omitted).

Here, Emily Hunter testified that at the time consultant was selected, she and her husband relied on the word of the people who took out the tanks to select AES and not the fact that AES was a registered consultant with the respondent. She further testified that neither she nor her husband did any background check on AES prior to their selection as the consultant for the remediation of their site. This testimony does not demonstrate that the petitioners reasonably relied on Department representations to their detriment. Accordingly, the doctrine of equitable estoppel does not apply here.

CONCLUSIONS OF LAW

1. Pursuant to Wis. Stat. § 101.143, the Department has primary and extensive authority for the promulgation and administration of the program for petroleum storage remedial action and financial assistance.

2. The Department is authorized to reimburse owners and operators for costs of remediating soil and water contamination for sites that are deemed to be eligible under the statute.

3. The Department is authorized to make progressive reimbursement payments to eligible participants under the PECFA program, pursuant to Wis. Stat. § 101.143(4)2a and b.

4. The single issue to be decided in this matter is whether the Department's decision was incorrect with regard to the $17,01.00 in costs denied because the work performed by Charles Miller and Strata for AES was not eligible pursuant to Comm § 47.33(1)3(b).

5. Petitioners did not reasonably rely on the Department's registration of AES or Strata to their detriment. The act of registering AES Consultants, Miller and/or Strata Geological Services, Inc. did not operate to the detriment to the petitioners.

6. The petitioners relied on the word of another service provider to elect AES and not the fact that AES was a registered consultant with the Department.

7. The Department's decision to deny $17,201.00 in costs submitted by the petitioners that reflected services provided by Miller, as owner of Strata Geological Services, while serving as a representative of AES Consultants, was consistent with past practice and in compliance with Comm §47.33(1)3(b

8. The Department's offset of the ineligible costs in the Strata invoices was within its authority granted under Wis. Stat. § 101.143(4)2a and b.

9. The Department exercised reasonable regulatory discretion pursuant to Comm § 47.41 in deciding not to disqualify the consultants.

10. As the Department's July 6, 2005 notice of hearing herein provides that this matter would be held as a Class 3 administrative hearing. Pursuant to Wis. Stat. § 227.45(7), discovery rights (including those included in Wis. Stat. Ch. 804) do not pertain to Class 3 administrative hearings, absent agency provision for same by rule (not the case here). Thus, petitioners had no right to discovery, including responses to request for admission. Therefore, the responses, made beyond the time normally allowed pursuant to discovery statutes, do not give rise to sanctions or other effect.

DECISION

The Department's decision herein is affirmed.

Date Mailed: _____

Mailed By: _____